

UNITED STATES BANKRUPTCY COURT

Eastern District of California

Honorable Ronald H. Sargis

Bankruptcy Judge
Modesto, California

January 30, 2014 at 10:00 a.m.

1. 13-92012-E-7 HAYDEE CASTANEDA MOTION FOR RELIEF FROM
MRG-1 Mark W. Girdner AUTOMATIC STAY AND/OR MOTION
FOR ADEQUATE PROTECTION
12-24-13 [[12](#)]

CAPITAL ONE AUTO FINANCE VS.

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee and Office of the United States Trustee on December 24, 2013. By the court's calculation, 37 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. See *Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Relief from the Automatic Stay is granted. No appearance required.

Capital One Auto Finance seeks relief from the automatic stay with respect to an asset identified as a 2005 Ford F150, VIN ending in 00540. The moving party has provided the Declaration of Shenneka Miller to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Miller Declaration states that the Debtor has not made five (5) pre-petition payments, with a total of \$1,862.65 in pre-petition payments past due. From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this asset is determined to be \$3,500.00, as stated in the Miller Declaration, while the value of the asset

January 30, 2014 at 10:00 a.m.

is determined to be \$12,292.51, as stated in Schedules B and D filed by Debtor.

Furthermore, the Movant states that according to the Debtor's Statement of Intention, the Property is being surrendered.

The court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the debtor has not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor has no equity, it is the burden of the debtor to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the asset for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the asset is *per se* not necessary for an effective reorganization. See *In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The court shall issue a minute order terminating and vacating the automatic stay to allow Capital One Auto Finance, and its agents, representatives and successors, and all other creditors having lien rights against the asset, to repossess, dispose of, or sell the asset pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, to obtain possession of the asset.

The moving party has not pleaded adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow Capital One Auto Finance, its agents, representatives, and successors, and any other beneficiary or trustee, and their respective agents and successors under its security agreement, loan

documents granting it a lien in the asset identified as a 2005 Ford F150 VIN ending in 00540, and applicable nonbankruptcy law to obtain possession of, nonjudicially sell, and apply proceeds from the sale of said asset to the obligation secured thereby.

No other or additional relief is granted.

2. [13-91315](#)-E-7 APPLEGATE JOHNSTON, INC. CONTINUED HEARING RE: MOTION
LIB-1 George C. Hollister FOR RELIEF FROM AUTOMATIC STAY
12-19-13 [[365](#)]

LIBERTY MUTUAL INSURANCE CO.
VS.

CONT. FROM 1-16-14

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtor, Debtor's Attorney, Chapter 7 Trustee, and Office of the United States Trustee on December 19, 2013. By the court's calculation, 28 days' notice was provided. 28 days' notice is required.

Tentative Ruling: The Motion to Compel Abandonment and for Relief from Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995).

The portion of the Motion requesting relief from the automatic stay is granted. Oral argument may be presented by the parties at the scheduled hearing, where the parties shall address the issues identified in this tentative ruling and such other issues as are necessary and appropriate to the court's resolution of the matter. If the court's tentative ruling becomes its final ruling, the court will make the following findings of fact and conclusions of law:

Movant Liberty Mutual Insurance Company ("Movant") seeks to compel abandonment of all the Debtor's rights, claims defenses, causes of action and cross-citations in the state court actions titled *Double B Demolition, Inc. v. Applegate Johnston, Inc. et al.*, Superior Court of California, Stanislaus County, Case No. 677254 and *Kilik General Engineering, Inc. V. Applegate Johnston, Inc. et al.*, Superior Court of California, Santa Clara County, Case No. 112-CV-223253 and to lift the automatic stay to allow Movant to assert all of the rights arising out of Debtor's subcontracts on their project and Debtor's claims and defenses in the state court actions.

The Motion seeks to have the court compel abandonment and terminate the automatic stay. While Federal Rule of Civil Procedure 18 and Federal Rule of Bankruptcy Procedure allow for a plaintiff to join multiple claims against a defendant in one complaint in an adversary proceeding, those rules are not applicable to contested matter in the bankruptcy case. Federal Rule of Bankruptcy Procedure 9014, which does not incorporate Rule 9018 for contested matters. The Movant have improperly attempted to join a motion to compel abandonment with a motion for relief from the automatic stay.

As with the present Motion, the reason for not incorporating Rule 7018 into contested matters is in part based on the short notice period for motions and the substantive matters addressed by the bankruptcy court in motions. These include sales of property, disallowing claims, avoiding interests in real and personal property, confirming plans, and compromising rights of the estate - proceedings which in state court could consume years. In the bankruptcy court, such matters may well be determined on 28 days notice. Allowing parties to combine claims and create potentially confusing pleadings would not only be a prejudice to the parties, but put an unreasonable burden on the court in the compressed time frame of bankruptcy case law and motion practice. The Motion is denied for this independent ground.

REVIEW OF MOTION

The court has parsed through the Motion and has identified the following grounds stated with particularity (Fed. R. Bank. P. 9013) asserted by Movant.

- A. Movant was and is the surety for Debtor with response to a construction project in connection with the City of San Jose Environmental Innovation Project.
- B. In 2010, Debtor executed a general agreement of indemnity to indemnify and hold harmless Movant from claims and losses arising out of bonds provided by Movant.
- C. Debtor assigned to Movant all right, title, and interest in and to all subcontracts let in connection with contracts bonded by Movant. Further, assigned all causes of action, claims, and demands whatsoever which the Debtor may have or acquire against any subcontractor, laborer, or materialman in connection with a contract bonded by Movant.
- D. Debtor confirmed on July 11, 2013, that it defaulted on its obligations to Movant.
- E. On July 16, 2013, Debtor filed the present Chapter 7 bankruptcy case.
- F. Movant has suffered \$1,200,000.00 in losses on the bonds it issued for Debtor's contracts.
- G. Movant is subrogated to the rights of the Debtor arising out of the contracts bonded by Movant.

- H. All of the Debtor's interests, rights and defenses for the claims in two specified state court actions were "fully assigned" to Movant prior to the commencement of the present Chapter 7 case.
- I. There is little or no net recovery value for the estate in or from the specified state court actions.

Motion, Dckt. 365.

The court is left unsure what, if anything, may be properly be abandoned pursuant to 11 U.S.C. § 554(b). The court may order the abandonment of property of the estate if it is burdensome or of inconsequential value. However, it must be property of the estate. The Motion asserts that all of the rights, interests, and defenses at issue were assigned to Movant prior to the commencement of this bankruptcy case. Therefore, taking Movant's pleadings as true and accurate (Fed. R. Bankr. P. 9011), there would be nothing to abandon. Further, if the court were to order the abandonment of assets of the Debtor which became property of the estate, then they would be abandoned back to the Debtor. If Movant seeks to obtain an "assignment" of such rights and interests, a motion for abandonment is not the "poor man's" shortcut for an assignment. Movant may obtain such an assignment, upon proper court order, from the Trustee. If the rights, interests, and defenses were so transferred, then Movant does not meet the minimum Constitutional standard for a case or controversy as required by Article III of the United States Constitution.

The Motion also includes a request for a "comfort order" so that Movant can prosecute the Debtor's counterclaim (which contrary to the other allegations appears to indicate a claim which is property of the estate). In asking for a "comfort order," Movant is stating that no order is required, but "it would be nice to have one." This further indicates that Movant does not meet the minimum Constitutional standard for a case or controversy as required by Article III of the United States Constitution. Alternatively, an order may be required but Movant is attempting to downplay the significance of the Motion to make it appear that the court's order is of no legal import.

Quite possibly if Movant had filed a separate motion for relief from the automatic stay, it could have stated with particularity clear grounds upon which relief was requested, why relief was necessary, the impact of the relief on the rights, interests, and other property of the estate. Further, a separate motion to abandon could clearly identify the specific property owned by the estate to be abandoned, why abandonment of the property was proper, and the factual and legal basis for the abandonment of the property of the estate to the Debtor.

As pleaded by Movant, it is asserted that all of the rights, defenses, and interests were assigned prior to the commencement of the case. (In her declaration, Christine Bartholdt states under penalty of perjury her legal conclusion that based on a pre-petition assignment, "Liberty has acquired any and all rights of the Debtor in the State Court Action. Dckt. 368, p. 4:13.) However, Movant wants to litigate claims and rights of the

estate in the state court action pursuant to a motion for relief from the stay.

The court in the guise of this patchwork of motions issue orders or rulings which could appear to make determinations of the conflicting allegations and testimony provided by Movant.

STIPULATION

Rather than denying the Motion without prejudice, the court continued the hearing to allow Movant and the Trustee to craft a stipulation addressing this matter. At the initial hearing, the Trustee stated that he concurred in granting the relief requested, and believed that a stipulation and proposed form of the order could be reached.

On January 22, 2014, the Trustee filed a Stipulation Regarding Liberty Mutual Ins. Co.'s Relief From Automatic Stay to Settle State Court Claims to resolve the motion and agree to the following:

1. Liberty withdraws the portion of its Motion requesting the Trustee's abandonment of the State Court Claims.

2. Immediately upon entry of the Court's Order, relief of the automatic stay is granted to Liberty with respect to the State Court Claims so the stay is lifted to allow Liberty to substitute in and be deemed as real party-in-interest in the State Court Actions, *Double B Demolition, Inc. v. Applegate-Johnston, Inc.*, Stanislaus Superior Court Case No. 677254 and *Kilik General Engineering, Inc. v. Applegate Johnston, Inc.*, Santa Clara Superior Court Case No. 112-CV-223253, to otherwise resolve the State Court Claims.

3. Nothing in this Stipulation shall serve to reduce, waive or enlarge or expand the rights of any party in and to the State Court Claims, for which all rights are reserved to all parties including those third parties persons and entities not a party to this Stipulation. The foregoing includes, without limitation, that nothing in this Stipulation shall enlarge, reduce, waive or limit Liberty's subrogation rights or the scope of rights of any secured party, the estate and/or any other creditor. The priority, extent and validity of the each party in and to the State Court Claims and the proceeds thereof shall remain as it is according to applicable law.

4. The Order terminating the automatic stay (within the scope as set forth in this Stipulation herein) shall be immediately effective and the 14-day holding period under Rule 4001(a) (3) shall be waived.

Stipulation, Dckt. 390.

The court finds that the Stipulation addresses the shortcomings in the Motion and concerns identified by the court. The one small modification in the proposed order which will be made by this court is to not affirmatively state that Movant "will be substituted in as the real party in interest." Such language could be read as this court making a determination as to the substantive rights of the parties. The court will modify the

language to provide that the stay is modified to allow Movant to exercise its rights and interests, as such may exist, to participate as a party in interest in the state court proceedings.

The court shall issue the order granting relief pursuant to the Stipulation.

3. [13-91773-E-7](#) **JUAN FLORES AND AIDE** **MOTION FOR RELIEF FROM**
KMR-1 **VALDIVIA** **AUTOMATIC STAY**
 Thomas O. Gillis **12-23-13** [\[15\]](#)
AMS SERVICING, LLC VS.

DISCHARGED 1-7-14

Local Rule 9014-1(f)(1) Motion - No Opposition Filed.

Correct Notice Provided. The Proof of Service states that the Motion and supporting pleadings were served on Debtors, Debtors' Attorney and Chapter 7 Trustee on December 23, 2013. By the court's calculation, 38 days' notice was provided. 28 days' notice is required.

Final Ruling: The Motion for Relief from the Automatic Stay has been set for hearing on the notice required by Local Bankruptcy Rule 9014-1(f)(1). The failure of the respondent and other parties in interest to file written opposition at least 14 days prior to the hearing as required by Local Bankruptcy Rule 9014-1(f)(1)(ii) is considered to be the equivalent of a statement of nonopposition. *Cf. Ghazali v. Moran*, 46 F.3d 52, 53 (9th Cir. 1995). Further, because the court will not materially alter the relief requested by the moving party, an actual hearing is unnecessary. *See Law Offices of David A. Boone v. Derham-Burk (In re Eliapo)*, 468 F.3d 592, 602 (9th Cir. 2006). Therefore, the defaults of the respondent and other parties in interest are entered. Upon review of the record there are no disputed material factual issues and the matter will be resolved without oral argument. The court will issue its ruling from the parties' pleadings.

The Motion for Relief from the Automatic Stay is granted. No appearance required.

AMS Servicing, LLC seeks relief from the automatic stay with respect to the real property commonly known as 25902 Avenue 18, Madera, California. The moving party has provided the Declaration of Diane Germain to introduce evidence to authenticate the documents upon which it bases the claim and the obligation owed by the Debtor.

The Germain Declaration states that the Debtor has not made 2 post-petition payments, with a total of \$2,606.76 in post-petition payments past due. From the evidence provided to the court, and only for purposes of this Motion for Relief, the debt secured by this property is determined to be \$280,971.11, secured by movant's first trust deed, as stated in the Germain Declaration, while the value of the property is determined to be \$197,700.00, as stated in Schedules A and D filed by Debtor.

The court maintains the right to grant relief from stay for cause when the debtor has not been diligent in carrying out his or her duties in the bankruptcy case, has not made required payments, or is using bankruptcy as a means to delay payment or foreclosure. *In re Harlan*, 783 F.2d 839 (B.A.P. 9th Cir. 1986); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985). The court determines that cause exists for terminating the automatic stay since the debtor has not made post-petition payments. 11 U.S.C. § 362(d)(1); *In re Ellis*, 60 B.R. 432 (B.A.P. 9th Cir. 1985).

Once a movant under 11 U.S.C. § 362(d)(2) establishes that a debtor has no equity, it is the burden of the debtor to establish that the collateral at issue is necessary to an effective reorganization. *United Savings Ass'n of Texas v. Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 375-76 (1988); 11 U.S.C. § 362(g)(2). Based upon the evidence submitted, the court determines that there is no equity in the property for either the Debtor or the Estate. 11 U.S.C. § 362(d)(2). This being a Chapter 7 case, the property is *per se* not necessary for an effective reorganization. See *In re Preuss*, 15 B.R. 896 (B.A.P. 9th Cir. 1981).

The Debtor was granted a discharge on January 7, 2014. Granting of a discharge to an individual under Chapter 7 lifts the automatic stay by operation of law. See 11 U.S.C. § 362(c)(2)(C). There being no automatic stay, the motion is denied as moot as to the Debtor. The Motion is granted as to the Estate.

The court shall issue a minute order terminating and vacating the automatic stay to allow AMS Servicing, LLC, and its agents, representatives and successors, and all other creditors having lien rights against the property, to conduct a nonjudicial foreclosure sale pursuant to applicable nonbankruptcy law and their contractual rights, and for any purchaser, or successor to a purchaser, at the nonjudicial foreclosure sale to obtain possession of the property.

The moving party has not pleaded adequate facts and presented sufficient evidence to support the court waving the 14-day stay of enforcement required under Rule 4001(a)(3), and this part of the requested relief is not granted.

No other or additional relief is granted by the court.

The court shall issue a minute order substantially in the following form holding that:

Findings of Fact and Conclusions of Law are stated in the Civil Minutes for the hearing.

The Motion for Relief From the Automatic Stay filed by the creditor having been presented to the court, and upon review of the pleadings, evidence, arguments of counsel, and good cause appearing,

IT IS ORDERED that the automatic stay provisions of 11 U.S.C. § 362(a) are vacated to allow AMS Servicing, LLC, its agents, representatives, and successors, and trustee

under the trust deed, and any other beneficiary or trustee, and their respective agents and successors under any trust deed which is recorded against the property to secure an obligation to exercise any and all rights arising under the promissory note, trust deed, and applicable nonbankruptcy law to conduct a nonjudicial foreclosure sale and for the purchaser at any such sale obtain possession of the real property commonly known as 25902 Avenue 18, Madera, California.

IT IS FURTHER ORDERED that to the extent the Motion seeks relief from the automatic stay as to the debtor, who was granted a discharge in this case, it is denied as moot pursuant to 11 U.S.C. § 362(c)(2)(C).

No other or additional relief is granted.